

Abortion Law Reform in Ireland: A Model for Change

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Abortion Law Reform in Ireland: A Model for Change

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Abstract

Ireland has some of the most restrictive abortion laws in the world. Abortion has been criminalised since 1861, and the passage of the 8th Amendment in 1983 introduced ‘the right to life of the unborn’ into the Constitution. The effects of the 8th Amendment are felt on a daily basis by women leaving Ireland for abortion, by pregnant women receiving maternal care, by doctors caring for pregnant women, and by lawyers working for the health service. As predicted by the then-Attorney General Peter Sutherland at the time of the referendum, the 8th Amendment has introduced an uncertain and practically unusable position to Irish law. It has, simply put, become “unliveable”.

In late 2014 Labour Women, a branch of the Irish Labour Party, established a Commission for Repeal of the 8th Amendment. That Commission comprised three groups: a political group, a medical group, and a group of legal experts. The authors of this paper are those legal experts. In this paper, we first outline the legal status quo as regards abortion in Ireland before making a case for constitutional reform. Having established the desirability of, and need for, constitutional reform we then outline the working principles that informed our drafting of the accompanying Access to Abortion Bill 2015, bearing in mind our intention to craft a model for reform that would be workable from the perspective of women’s lives, medical practice, and politics. Although drafted as part of the Labour Women Commission, and with some (limited) input from the other Commission groups, the proposed draft is that of the authors of this paper (working within the confines of our remit as ‘legal experts’ to the Commission) and not of the Labour Party or of Labour Women. It is made available here for discussion, debate and development by all interested parties.

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Introduction

Ireland has some of the most restrictive abortion laws in the world. Abortion has been criminalised since 1861,¹ and the passage of the 8th Amendment in 1983 introduced ‘the right to life of the unborn’ into the Constitution. In the 32 years since then, the 8th Amendment has spurred protest, litigation, and a flight of abortion-seeking women from the country; it has allowed the political system to systematically abdicate responsibility for the responsible regulation of reproductive freedom in Ireland;² it has contributed to the deaths and ill-health of unknown numbers of women and, potentially, children.

The legal landscape has not remained static since the 8th Amendment of 1983. In fact, as outlined below (and in more detail elsewhere),³ there have been spikes of legal and political activity, largely responding to extreme cases in which the sharp end of the 8th Amendment has become visible: the confinement of a 14-year-old rape victim in Ireland so that she could not access an abortion in the UK,⁴ the death of a Galway dentist from sepsis during a protracted miscarriage,⁵ the subjection of a suicidal asylum seeker, pregnant through rape, to unwanted Caesarean section,⁶ the maintenance of organ function of a deceased woman in order to prolong her

¹ Offences against the Person Act 1861, s 58.

² M Fox and T Murphy, ‘Irish Abortion: Seeking Refuge in a Jurisprudence of Doubt and Delegation’ (1992) 19(4) *Journal of Law and Society* 454.

³ On abortion in the Republic of Ireland and Northern Ireland, see J Kingston, *Abortion and the Law: An Irish Perspective* (Roundhall 1997); C Murray, ‘The Protection of Life During Pregnancy Act 2013: Suicide, Dignity and the Irish Discourse on Abortion’ (2016) *Social and Legal Studies* (forthcoming); F de Londras, ‘Constitutionalizing Fetal Rights: A Salutary Tale from Ireland’ (2015) 22 *Michigan Journal of Gender and the Law* (forthcoming); J Schweppe (ed), *The Unborn Child, Article 40.3.3 and Abortion in Ireland: 25 Years of Protection?* (Liffey Press 2008); C O’Sullivan, J Schweppe and E Spain (eds), *Legislating for Article 40.3.3: Abortion Law in Ireland* (special issue of *Irish Journal of Legal Studies* 3(3) (2013)); I Bacik, ‘The Irish Constitution and Gender Politics: Developments in the Law on Abortion’ (2013) 28(3) *Irish Political Studies* 380; R Fletcher, ‘Reproductive Justice and the Right to Life of the Unborn’ in J Schweppe (ed), *The Unborn Child, Article 40.3.3 and Abortion in Ireland: 25 Years of Protection?* (Liffey Press 2008); S McGuinness, ‘A, B and C leads to D (for Delegation!): A, B and C v Ireland 25579/05 [2010] ECHR 2032’ (2011) 19 *Medical Law Review* 476; R Fletcher, ‘Pro-Life Absolutes, Feminist Challenges: The Fundamentalist Narrative of Irish Abortion Law 1986–1992’ (1998) 36(1) *Osgoode Hall Law Journal* 1; R Boland and L Katzive, ‘Developments in Laws on Induced Abortion: 1998–2007’ (2008) 34(3) *International Family Planning Perspectives* 110; E Fegan and R Rebouche, ‘Northern Ireland’s Abortion Law: The Morality of Silence and the Censure of Agency’ (2003) 11(3) *Feminist Legal Studies* 221; C Roulston, ‘Women on the Margin: The Women’s Movement in Northern Ireland: 1973–1988’ (1989) 53(2) *Science & Society* 219; M Boyle and J McEvoy, ‘Putting Abortion in its Social Context: Northern Irish Women’s Experiences of Abortion in England’ (1998) 2(3) *Health* 283; B Pinter, ‘Medico-legal Aspects of Abortion in Europe’ (2002) 7(1) *European Journal of Contraception and Reproductive Health Care* 15.

⁴ *Attorney General v X* [1992] 1 IR 1.

⁵ On the death of Savita Halappanavar see K Holland, ‘Woman Denied a Termination Dies in Hospital’, *The Irish Times* (14 November 2012). Available online at <<http://www.irishtimes.com/news/woman-denied-a-termination-dies-in-hospital-1.551412>> accessed 17 March 2015. M Enright and F de Londras, ‘Empty Without and Empty Within: The Unworkability of the Eighth Amendment after Savita Halappanavar and Miss Y’ (2014) 20(2) *Medico-Legal Journal of Ireland* 85.

⁶ See R Fletcher, ‘Contesting the Cruel Treatment of Abortion-Seeking Women’ (2014) 22(4) *Reproductive Health Matters* 10.

pregnancy.⁷ However, the effects of the 8th Amendment are felt on a daily basis by women leaving Ireland for abortion, by pregnant women receiving maternal care, by doctors caring for pregnant women, and by lawyers working for the health service. As predicted by the then-Attorney General Peter Sutherland at the time of the referendum, the 8th Amendment has introduced an uncertain and practically unusable position to Irish law.⁸ It has, simply put, become “unliveable”.⁹

In late 2014 Labour Women, a section of the Irish Labour Party, established a Commission for Repeal of the 8th Amendment.¹⁰ That Commission comprised three groups: a political group, a medical group, and a group of legal experts. The authors of this paper are those legal experts. The Commission’s stated aim was to

...examin[e] the best legal and political strategies to accomplish:

1. Repeal of Article 40.3.3 of the Constitution in its entirety;
2. The introduction of detailed legislation providing for the circumstances in which abortion may legally take place.¹¹

In our work for the Commission we both proposed a constitutional amendment to replace the 8th Amendment and drafted model legislation for the provision and regulation of abortion care in Ireland that could be introduced should a referendum be successful. The General Scheme of our proposed law (the Access to Abortion Bill 2015), together with extensive explanatory notes, is included alongside this short contextualising paper. It is important to be clear that this draft law does not represent Labour Party policy; in fact, the motion passed in support of repeal of the 8th Amendment in February 2015 by the Labour Party Conference proposes changes that are far more limited than those we put forward here.¹² In addition, this does *not* necessarily represent our ‘ideal’ legislation; rather, it was crafted in response to the political process in which we were engaged, taking what we, and those working with us in the Labour Party, considered to be political realities and pragmatic concerns into account. It is, however, a workable model for change in abortion law in Ireland, designed with women’s lived experiences in mind.

In this paper, we first outline the legal *status quo* as regards abortion in Ireland before making a case for constitutional reform. Having established the desirability of, and

⁷ *PP v HSE* unreported (HC 24 December 2014).

⁸ See memoranda of Attorney General Peter Sutherland to Government of 15 February 1983 and 1 March 1983 (National Archives Ref 2013/100/557-569).

⁹ R Fletcher, ‘Making Law Liveable: Bringing Feminist Knowledge of Care into the Curriculum’ (Revaluing Care Research Network, 25 February 2015) <<http://revaluingcare.net/making-law-liveable-bringing-feminist-knowledge-of-care-into-the-curriculum/>> accessed 22 March 2015.

¹⁰ ‘Press Release: Labour Women Establish Commission on Repeal of the 8th Amendment’ (*Labour Women*, 9 December 2014) <<http://www.labour.ie/women/newsandevents/2014/12/09/labour-women-establish-commission-on-repeal-of-the/>> accessed 14 May 2015.

¹¹ *ibid.*

¹² See the motion as approved by the Labour Party Conference 2015: <<http://www.labour.ie/conference/motions/detail/142486460740543/>> ; see also the report upon which the debate was based: ‘Commission to Repeal the 8th Amendment: Report’ (*Labour Women*, 22 February 2015) <<http://www.labour.ie/women/newsandevents/2015/02/22/report-on-repealing-the-8th-amendment-passed-at-co/>> accessed 28 May 2015.

need for, constitutional reform we then outline the working principles that informed our drafting of the Access to Abortion Bill 2015, bearing in mind our intention to craft a model for reform that would be workable from the perspective of women's lives, medical practice, and politics. Although drafted as part of the Labour Women Commission, and with some (limited) input from the other Commission groups, the proposed draft is that of the authors of this paper (working within the confines of our remit as 'legal experts' to the Commission) and *not* of the Labour Party or of Labour Women. It is made available here for discussion, debate and development by all interested parties.

The Legal Status Quo

The law relating to abortion in Ireland comprises Article 40.3.3 of the Constitution and the Protection of Life During Pregnancy Act 2013. Article 40.3.3 is formed by the 8th, 13th and 14th amendments to the Constitution. Until 1983 the Irish Constitution—in common with most constitutional texts¹³—was entirely silent on the question of abortion, although procuring an abortion was a criminal offence that attracted a sentence of up to life imprisonment under the Offences against the Person Act 1861.¹⁴ However, in the early 1980s a campaign formed with the aim of having the constitution amended in order to entirely foreclose the possibility of abortion being legally permissible in Ireland.¹⁵ To at least some extent, this was due to concern on the part of some conservative Catholics that the recent Supreme Court decision in *McGee v Attorney General*¹⁶ (finding that family planning was part of the constitutionally protected unenumerated right to marital privacy) might later be applied to find a right to access abortion (either as part of the right to bodily integrity¹⁷ or the right to privacy)¹⁸ in a manner similar to the US Supreme Court's decisions in *Griswold v Connecticut*¹⁹ and *Roe v Wade*.²⁰ Thus, although there was no suggestion at the time that abortion would be made legally available in Ireland, a sustained campaign of cultural and political pressure led to the 8th Amendment being put to the People.

¹³ Ireland was the first country to put foetal rights into its Constitution or otherwise to explicitly 'constitutionalise' the regulation of abortion. See F de Londras, 'Constitutionalizing Fetal Rights: A Salutory Tale from Ireland' (2015) 22 Michigan Journal of Gender and the Law (forthcoming).

¹⁴ Section 58.

¹⁵ On the Pro-Life Amendment Campaign and referendum see; J P O'Carroll, 'Bishops, Knights—and Pawns? Traditional Thought and the Irish Abortion Referendum Debate of 1983' (1991) 6(1) Irish Political Studies 53; U Barry, 'Abortion in the Republic of Ireland' (1988) 29 Feminist Review 57; F O'Toole, 'Why Ireland Became the Only Country in the World to have a Constitutional Ban on Abortion' *The Irish Times* (26 August 2014) <<http://www.irishtimes.com/news/politics/why-ireland-became-the-only-country-in-the-democratic-world-to-have-a-constitutional-ban-on-abortion-1.1907610>> accessed 17 March 2015; T H Hesketh, *The Second Partitioning of Ireland: The Abortion Referendum of 1983* (Brandsma Books 1990).

¹⁶ [1974] IR 284.

¹⁷ *Ryan v Attorney General* [1965] 1 IR 264; *The State (C) v Frawley* [1976] 1 IR 365.

¹⁸ Article 41.1 Constitution of Ireland; *McGee v Attorney General* [1974] IR 284.

¹⁹ 381 US 479 (1965).

²⁰ 410 US 113 (1973).

After a referendum campaign so divisive that an *Irish Times* editorial called it “the second partitioning of Ireland”,²¹ 66.9% of the electorate that turned out (turn out: 53.67%) voted in favour of the Amendment and the following text was added to the Constitution:

The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.

In the years that followed, and in spite of representations to the contrary during the referendum campaign, a spate of litigation resulted in the courts holding that nothing which might undermine the foetal right to life could be considered constitutionally permissible.²² This resulted in travel and information being severely curtailed so that pregnancy in Ireland brought with it a greatly reduced body of exercisable rights: freedom of movement, liberty, bodily integrity, association, speech and privacy were subordinated to the foetal right to life, which took on the character of the preeminent constitutional right.

Following the Supreme Court’s decision in *Attorney General v X*²³ (‘the *X Case*’) a further referendum was held in which the 13th and 14th amendments to the Constitution were passed by the electorate. These amendments reversed the jurisprudence that restricted information and travel by asserting that the 8th Amendment did not adversely affect the rights to travel and to receive information regulated by law:

This subsection shall not limit freedom to travel between the State and another state.

This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state.

Thus, as of 1992, the Irish Constitution contains within it a three-part provision relating to reproductive choice: first, a statement of a constitutionally protected foetal right to life to be protected and vindicated as far as practicable and with due regard to the equal right to life of the pregnant woman, a right to travel, and a right to receive information relating to reproductive choices. Since 1983 no proposal to liberalise the abortion law regime in Ireland has ever been put before the People by way of referendum.

Leaving to one side the clearly paradoxical nature of that package of constitutional provisions, the existence of these constitutional provisions without accompanying and clarifying legislation caused clear difficulties for both women and medics. This is

²¹ Editorial, *The Irish Times* (30 August 1983).

²² See *Mayo-Perrott v Mayo-Perrott* [1958] IR 336; *Attorney General (SPUC) v Open Door Counselling Limited and the Wellwoman Centre Ltd* [1988] 1 IR 593; *Society for the Protection of the Unborn Child v Grogan* [1989] IR 753.

²³ [1992] 1 IR 1.

because the text of the 8th Amendment seemed clearly to allow for pregnancy to be terminated in situations where maintenance of the pregnancy would be futile (“as far as practicable”) and where the life of the pregnant woman depended on it (“with due regard to the equal right to life of the mother”). In spite of this, the only legislation that dealt with abortion in Ireland was the Offences against the Person Act 1861 which, as noted above, criminalised abortion so that any abortion carried out in Ireland that was not permitted by the 8th Amendment was an offence carrying a possible sentence of life imprisonment. Indeed, in *Attorney General v X* the Supreme Court was uncharacteristically robust in its criticism of the legislative stasis in this respect, with McCarthy J noting:

...the failure by the legislature to enact the appropriate legislation is no longer just unfortunate; it is inexcusable. What are pregnant women to do? What are the parents of a pregnant girl under age to do? What are the medical profession to do? They have no guidelines save what may be gleaned from the judgments in this case.²⁴

Indeed, it was not until 2013, in the wake of an adverse finding by the European Court of Human Rights²⁵ that a legislative framework was introduced: the Protection of Life During Pregnancy Act 2013 (PLDPA).

This Act was said to provide clear procedural avenues to exercise the constitutional right to termination of pregnancy where a pregnant woman’s life is subject to a “real and substantial” risk that can only be averted by bringing the pregnancy to an end.²⁶ When read with the accompanying guidelines for the medical profession,²⁷ published some months after the Act, the PLDPA appears to regulate both abortion and early delivery (including induction and Caesarean section), with abortion being permitted where the foetus is not yet ‘viable’ (not defined in the legislation) and early delivery being the means of termination where the foetus is deemed viable. Here viability is considered an exclusively medical concept, so that access to abortion (i.e. access to a constitutional right) is determined by a medical decision related to the foetus and not to the health, well-being or life of the pregnant woman. Indeed, the Act as a whole structures abortion very clearly as a matter of medical decision-making rather than of a woman’s bodily integrity, self-determination and autonomy in medical matters. This is, perhaps, entirely congruent with the 8th Amendment itself, which serves to strip pregnant women of their autonomy in reproductive decision-making. In order to access an abortion in Ireland a woman must fulfil one of three possible sets of circumstances/requirements:

- (a) Two medical practitioners (one of whom is an obstetrician) must have certified that there is a real and substantial risk to the life of a pregnant woman

²⁴ [1992] 1 IR 1, *per* McCarthy J at 147. See comments of McCarthy J in *Society for the Protection of the Unborn Child v Grogan* [1989] IR 753, 770. See also McKechnie J in *D (A Minor) v Judge Brennan, the HSE, Ireland, and the Attorney General* unreported (HC 9 May 2007).

²⁵ *A, B & C v Ireland* (2011) 53 EHRR 13.

²⁶ This is the ‘test’ laid down in *Attorney General v X* [1992] 1 IR 1.

²⁷ Department of Health, *Implementation of the Protection of Life During Pregnancy Act 2013: Guidance Document for Health Professionals* (19 September 2014).

- that emanates from a physical illness and which can only be averted by termination of the pregnancy²⁸ and that the foetus is not yet viable. This certification must be done in ‘good faith’, which is understood as cognisance of the need to preserve foetal life to the extent possible;²⁹ or
- (b) There is an emergency situation in which a single doctor has certified that there is a real and substantial risk to the life of the pregnant woman that emanates from a physical illness and which can only be averted by termination of the pregnancy,³⁰ and that the foetus is not yet viable. This certification must be done in ‘good faith’, which is understood as cognisance of the need to preserve foetal life to the extent possible;³¹ or
- (c) Three doctors (one of whom must be an obstetrician and one of whom must be a psychiatrist) must have certified that there is a real and substantial risk to the life of the pregnant woman that emanates from a risk of suicide and which can only be averted by termination of the pregnancy,³² and that the foetus is not yet viable. This certification must be done in ‘good faith’, which is understood as cognisance of the need to preserve foetal life to the extent possible.³³

The law relating to abortion in Ireland is unsatisfactory and unsustainable. First, the process for accessing a constitutionally permitted abortion is overly onerous and likely to add to the distress of women in life-threatening situations.³⁴ Second, the scope of permissible abortion is far too narrow to properly vindicate the life of pregnant women; it fails to take into account serious health implications, short of the risk of death, that may emerge from or during pregnancy, to take into account risks to mental health (including in particular risks to mental health that may arise when pregnancy results from sexual violence),³⁵ and to take into account the basic socio-economic requirements for a healthy and adequate standard of living for pregnant women and those (including already living children) who may be dependent on her. Third, the limited availability of abortion in Ireland means that women who wish to access abortion must travel abroad to do so, creating significant financial burdens and possibly leading to later and more dangerous abortions as women try to gather the financial resources required to travel. Fourth, women without the financial or other means (e.g. travel documents) are not generally aided in exercising their right to travel and may thus be left with no way to access abortion. Fifth, the restrictive nature of abortion in Ireland may exacerbate the risks that a pregnant woman who cannot travel because of financial constraints, lack of travel documents, age, lack of mobility due to conditions of violence or coercion beyond her control (e.g. domestic violence), or other complicating health conditions might self-harm in order to attempt to cause the

²⁸ Protection of Life During Pregnancy Act 2013, s 7.

²⁹ *ibid.*

³⁰ Protection of Life During Pregnancy Act 2013, s 8.

³¹ *ibid.*

³² Protection of Life During Pregnancy Act 2013, s 9.

³³ *ibid.*

³⁴ See M Taylor, ‘Women’s Right to Health and Ireland’s Abortion Laws’ (2015) 130(1) *International Journal of Gynecology and Obstetrics* 93; J Erdman, ‘Procedural Abortion Rights: Ireland and the European Court of Human Rights’ (2014) 22(4) *Reproductive Health Matters* 22.

³⁵ See A W Burgess and L L Holmstrom, ‘Rape Trauma Syndrome’ [1974] *American Journal of Psychiatry* 981. Rape trauma syndrome is a form of post traumatic stress disorder: see American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th edn, Washington DC 2013).

termination of a pregnancy.³⁶ Finally, the criminalisation of abortion creates a space for the arbitrary and unequal application of the law by medical practitioners, meaning that even lawful abortions may be denied in practice.³⁷ Criminalisation also reinforces the stigma felt by women who wish to access abortion, including those who travel abroad to do so.³⁸

The Need for Constitutional Change

The plain wording of the 8th Amendment to the Constitution appears to allow for room for the rights and interests of pregnant women and foetuses to be subjected to a process of ‘balancing’, which has some potential for broad and progressive interpretation. The fact that ‘due regard’ is to be had for the ‘equal right to life’ of the pregnant woman holds scope for progressivism. An expansive interpretation of ‘life’, for example, to mean more than ‘bare’ life (i.e. ‘being alive’) and to encompass welfare concerns relating to the quality of life³⁹ may mean that a pregnancy in which there is a high risk of a woman suffering from severe and lasting medical repercussions might be one that could be constitutionally terminated. This is not least because a foetal right to life is, by necessity, a ‘bare’ right: the right to be born. The foetus has no other capacity for life; it is wholly dependent for its survival on the body of the pregnant woman.⁴⁰ In addition, the fact that the state’s obligation is to

³⁶ On the shortcomings and deficiencies of the *status quo* see; Irish Family Planning Association, *The Irish Journey: Women’s Stories of Abortion* (Dublin 2010); National Women’s Council of Ireland, ‘Policy Paper on Abortion’ (March 2013) 16 <http://www.nwci.ie/download/pdf/nwci_policy_position_paper_on_abortion_final.pdf> accessed 24 September 2014; Human Rights Watch, *A State of Isolation: Access to Abortion for Women in Ireland* (New York: Human Rights Watch 2010) available at <www.hrw.org/sites/default/files/reports/ireland0110webwcover.pdf> accessed 24 September 2014; CEDAW Committee, *Concluding Observations: Ireland* (UN CEDAW/C/SR 440 1999) 185; Convention Against Torture Committee, *Concluding Observations: Ireland* (UN CAT/C/IRL/CO/1 2011) 26 emphasis on the discriminatory impact of the requirement to travel; Irish Family Planning Association, *Comments of the Irish Family Planning Association (IFPA) in respect of the Fourth Periodic Review of Ireland under the International Covenant on Civil and Political Rights (ICCPR)* (Dublin: IFPA 2014); Centre for Reproductive Rights, *Abandoned and Stigmatised: The Effect of the Irish Abortion Law on Women* (2014) 22, available at <http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/IRL/INT_CCPR_CSS_IRL_17442_E.pdf> accessed 24 September 2014; Doctors for Choice, *Submission to the United Nations Human Rights Committee for Ireland’s Review Under the ICCPR* (12 June 2014) 16–17 available at <http://www.ccrpcentre.org/doc/2014/06/INT_CCPR_CSS_IRL_17440_E.pdf> accessed 24 September 2014; Concluding Observations of the UNHRC, 111th session (23 July 2014) (CCPR/C/IRL/CO/4) available at <<http://www.rte.ie/news/2014/0715/630888-un-human-rights/>> accessed 29 May 2015.

³⁷ See *RR v Poland* [2011] ECHR 828; *A, B and C v Ireland* (2011) 53 EHRR 13.

³⁸ On decriminalisation see S Sheldon, ‘The Regulatory Cliff Edge between Contraception and Abortion: The Legal and Moral Significance of Implantation’ (2015) *Journal of Medical Ethics* (forthcoming); J Hughes, ‘From Abortions to Sex Work: What Decriminalization Can Teach us about Stigma in Criminal Law’ available at SSRN: <http://ssrn.com/abstract=2548642> or <http://dx.doi.org/10.2139/ssrn.2548642>

³⁹ See R Fletcher, Opening Statement to Oireachtas Health Committee (21 May 2013) available at <<http://www.oireachtas.ie/parliament/media/committees/healthandchildren/Dr-Ruth-Fletcher,-Keele-University.pdf>> accessed 28 May 2015.

⁴⁰ See the decision of the High Court in *MR v TR* [2006] IEHC 359 protecting embryos from implantation. See also *R v R & Ors* [2006] IEHC 221; *Roche v Roche & Ors* [2009] IESC 82.

protect and vindicate the right to life of the foetus ‘as far as practicable’ seems, on a plain textual analysis, to suggest that the state is not obliged to do that which is futile⁴¹ or to do that which imposes undue and unreasonable burdens on the body, health, life, welfare and dignity of the pregnant woman. However, a combination of judicial interpretation, legal conservatism from successive Attorneys General, and a conservative politics of abortion in Ireland have built a deeply repressive jurisprudence, practice and law of abortion around Article 40.3.3.

Compared with other jurisdictions where the ‘murky status of the “unborn”’ can be contrasted to ‘the more certain world of being a person’,⁴² in Ireland ‘the unborn’ is a powerful rhetorical device, which secures the status of the implanted embryo/foetus. In order to fully understand the context within which Irish abortion law reform is being considered this particular framing is important. The language of ‘the unborn’ allows the foetus to be elevated far beyond its physical significance. The tables are turned to the extent that not only does the foetus stand as equal to the pregnant woman, but comes to over-shadow her. Rather than the physical reliance of the foetus on the pregnant woman being conceptualised as a limit on her obligations towards it,⁴³ her capacity to remove her physical ‘support’ comes to constitute a threat against ‘the unborn’ such that otherwise everyday freedoms are subject to restrictions. Women, and in particular pregnant women, live in the shadow of this legal construct that allows their rights as individuals to be completely overridden/ subsumed.

All of this goes to say that, *prima facie*, the 8th Amendment need not be as it currently is; it is arguably open to a different, more imaginative and more progressive, interpretation so that constitutional change might be achieved through judicial intervention and interpretation without the need for a referendum. Three things, however, suggest that this is unlikely.

First, there is strong government support for the view that the intention of the People in 1983, after a thoroughly argued and rigorous referendum campaign, was unquestionably to prevent the introduction of all but life-saving abortion in Ireland.⁴⁴ This view is, of course, open to contestation.⁴⁵ Nevertheless, any court will be wary of imposing an interpretation on the amendment that seems plainly at odds with that

⁴¹ *Attorney General v X* [1992] 1 IR 1; *In re a Ward of Court (withholding medical treatment) (No 2)* [1996] 2 IR 79; *PP v HSE* unreported (HC 24 December 2014) 21-23.

⁴² J Herring, ‘The Loneliness of Status: The Legal and Moral Significance of Birth’ in F Ebtehaj et al (eds), *Birth Rites and Rights* (Hart 2011) 97. See M Fox and S McGuinness, ‘The Politics of Muddling Through: Categorising Embryos’ in C Stanton et al (eds), *Pioneering Healthcare Law: Essays in Honour of the Work of Margaret Brazier* (Routledge 2016: forthcoming)

⁴³ F M Kamm, *Creation and Abortion: A Study in Moral and Legal Philosophy* (Oxford University Press 1992).

⁴⁴ This was notably the argument made by the State and accepted by the European Court of Human Rights in *A, B and C v Ireland* (2011) 53 EHRR 13 as well as by the Minister for Justice, Frances Fitzgerald, to the UN Human Rights Committee – ‘Opening Remarks: Ireland’s Appearance before the UN Human Rights Committee on the International Convention on Civil and Political Rights’ (July 2014) 14-15 available at <<http://www.justice.ie/en/JELR/Pages/SP14000193>> accessed 28 May 2015.

⁴⁵ See S McAvoy, ‘Vindicating Women’s Rights in a Fetocentric State: The Longest Irish Journey’ in N Giffney and M Shildrick (eds), *Theory on the Edge: Irish Studies and the Politics of Sexual Difference* (Palgrave 2013) 39; B Girvan, ‘Social Change and Moral Politics: The Irish Constitutional Referendum 1983’ (1986) 34 *Political Studies* 61.

intention, no matter the open nature of its text. This is not least because doing so would result in accusations of illegitimate ‘activism’ by the Court. Indeed, the Supreme Court’s finding in the *X Case* that abortion was permissible under Article 40.3.3 in cases of real and substantial risk to the life of the mother continues to be criticised from pro-life quarters as illegitimately frustrating the will of the People.⁴⁶ This is so even though the ‘life exception’ was arguably within the intention of the electorate in 1983 as the wording manifestly allowed for termination of a pregnancy where a woman’s life was in danger.

Second, the courts may be ethically and structurally closed to elaboration of the abortion jurisprudence along pro-choice lines. In the first place, pregnant women who have an alternative do not sue the state in order to confirm their entitlement to end their pregnancies. Many of the women who have brought cases have been young women in the care of the state, seeking to confirm the scope of the existing law, rather than to expand it.⁴⁷ Activist litigation in the domestic courts has been spearheaded by the Society for the Protection of the Unborn Child, via the *locus standi* afforded to champions of the unborn.⁴⁸ Progressive activist litigation has been very limited and has taken place in international courts,⁴⁹ suggesting pro-choice disillusionment with the Irish courts as viable fora within which to extend abortion law. That disillusionment appeared justified in the light of a number of bruising encounters in the years after the referendum. In the late 1980s the courts engaged in conservative and pro-natalist interpretation of the 8th Amendment, finding that there is a clear public interest in litigating to vindicate foetal rights which justifies a wide range of state interventions into women’s lives, including the restriction of their access to abortion information.⁵⁰ More recent decisions such as December’s discovery of the potentially uncontainable notion of ‘foetal best interests’ in *PP v HSE*⁵¹ suggest a need for continued caution in any approach to the courts.

Third, even if Irish courts were to revisit their approach to the 8th Amendment and, prompted by imaginative and progressive lawyering based on the plain text of Article 40.3.3, were to expand the scope of constitutionally permissible abortion in Ireland two insurmountable problems would remain. Political consensus around recognising women as persons with the right and capacity to make their own reproductive choices in the event of pregnancy would not have been developed, arguably making the judicially developed position unstable and women’s rights under the 8th Amendment

⁴⁶ See W Binchy, ‘New abortion regime has no effective limits’ *The Irish Times* (6 March 1992) 13; M Tynan, ‘Campaign to amend the Constitution launched’ *The Irish Times* (11 March 1992) 3; B Gilhealy, ‘The State and the Discursive Construction of Abortion’ in V Randall and G Waylen (eds), *Gender, Politics and the State* (Routledge 1998) 58, 74-75.

⁴⁷ See *D (A Minor) v Judge Brennan, the HSE, Ireland, and the Attorney General* unreported (HC 9 May 2007).

⁴⁸ *SPUC v Coogan* [1989] IR 734.

⁴⁹ For example *A, B & C v Ireland* (2011) 53 EHRR 13; *Society for the Protection of Unborn Children Ireland Ltd v Grogan*, Case C-159/90 [1991] ECHR 4685; *Open Door and Dublin Well Woman v Ireland* [1992] ECHR 68.

⁵⁰ *SPUC v Coogan* [1989] IR 734.

⁵¹ *PP v HSE* unreported (HC 24 December 2014).

fragile.⁵² Furthermore, abortion availability would still be extremely limited. While an imaginative and progressive interpretation of the 8th Amendment is possible, it still cannot go beyond the clear limitations of the text. No matter how it is interpreted, it remains clear that the 8th Amendment enshrines a ‘foetal right to life’ in the Constitution, that the only way for the state to protect and vindicate that right is through the body of a pregnant woman, and that fairly restrictive regulation of abortion and pregnancy will thus remain.

There are, of course, strong political arguments for repeal by referendum in itself. A referendum to repeal the 8th Amendment would be more than an opportunity to correct stagnant judicial interpretation; it would be a chance for the People to make a progressive statement about the appropriate relationship between state power and a woman’s body, self-determination and autonomy. The recent marriage equality referendum⁵³ upset the old wisdom—gleaned from previous abortion and divorce campaigns—that referenda to liberalise the constitutional position on controversial social issues are inevitably divisive, and can only ever yield small majorities in favour of progressive reform. In the aftermath of the referendum, this view is being revised, even in mainstream political circles. There is now an acknowledgment that referenda on social issues have the potential to yield large progressive turnouts and majorities, which in turn lend apparent popular legitimacy to reform.⁵⁴ Perhaps as importantly, referendum campaigns lend themselves to strategic engagement by civil society actors, which may decisively reshape public consensus around human rights issues. Ireland is home to a variety of well-organised civil society groups which are already active in campaigning for liberalisation of abortion law; these include the Irish Family Planning Association, the Coalition to Repeal the 8th Amendment, the Abortion Rights Campaign, the Association for Improvements in Maternity Services, ROSA, Termination for Medical Reasons Ireland and Doctors for Choice. A referendum would provide them with a sustained platform for public engagement.

Given this, our starting point—and that of the Labour Women Commission—was that constitutional reform is required. One option, which appears attractive in its simplicity, is to simply remove Article 40.3.3 from the Constitution. However, our view is that this would not successfully ‘deconstitutionalise’ abortion, not least

⁵² For an analysis of the fragility of the right to access abortion as a result of its emergence through litigation, rather than through politics, see R West, ‘From Choice to Reproductive Justice: De-constitutionalising Abortion Rights’ in R West, J Murray and M Esser (eds), *In Search of Common Ground on Abortion* (Ashgate 2014). For a more optimistic take on the possibilities of strategic litigation from an activist perspective see M Rao and B Klugman, ‘Considering Strategic Litigation as an Advocacy Tool: A Case Study of the Defence of Reproductive Rights in Colombia’ (2014) 22(44) *Reproductive Health Matters* 31.

⁵³ Referendum on the 34th Amendment to the Constitution Bill held on 22 May 2015. The proposed amendment, permitting same-sex marriage, was approved by the electorate. See ‘Referendum of 22 May 2015’ <<http://electionsireland.org/results/referendum/refresult.cfm?ref=201534R>> accessed 30 May 2015.

⁵⁴ See, for example, the views of Ministers Kathleen Lynch and James Reilly as reported in S Pollack and D Griffin, ‘Repeal of the Eighth Amendment is Very Do-able’ *The Irish Times* (25 May 2015) available at <<http://www.irishtimes.com/news/social-affairs/repeal-of-the-eighth-amendment-is-very-do-able-1.2225166>> accessed 28 May 2015. The Taoiseach has said, however, that there ought not to be a ‘rush’ towards any such referendum: S Connolly, ‘Enda Kenny Warns against a ‘Rush’ for Abortion’ *Irish Examiner* (27 May 2015) available at <<http://www.irishexaminer.com/ireland/enda-kenny-warns-against-rush-for-abortion-referendum-333064.html>> accessed 28 May 2015.

because superior courts' jurisprudence has found that the right to life of the unborn is part, not only of the text of the Constitution but also of the natural and common law.⁵⁵ Thus, it is conceivable that the right to life of the unborn, albeit a weaker right than that enshrined in the 8th Amendment, might still be said to exist even in the face of simple deletion.

We accept that this is unlikely: the referendum process enshrines the People as the ultimate arbiters of constitutional content where such a formal constitutional amendment has taken place, and courts are unlikely to proceed in a way that manifestly frustrates popular intention. However, in a field that has been mired by obfuscation for decades, there is a virtue in clarity. Furthermore, a referendum campaign would offer an opportunity to enshrine a positive responsibility on the state to recognise women's agency in pregnancy, not just concerning abortion but also in relation to a wide range of medical decisions including around labour and medical treatment.⁵⁶ Thus, we propose the deletion of the first clause of Article 40.3.3 of the Constitution (i.e. the 8th Amendment) and its replacement with the following text:

The State guarantees by its law to protect and vindicate the right of all persons to bodily integrity and, in particular, to self-determination in all matters of medical treatment.

Nothing in this Constitution shall be read as prohibiting abortion as regulated by law.

Legislative Change

It is important to note that a successful referendum to repeal the 8th Amendment would not result in a regulatory vacuum. Rather, the Protection of Life During Pregnancy Act 2013 would continue to operate. However, ideally there would be a speedy replacement of that Act with a piece of legislation that provides for a fuller regulation of abortion care in Ireland. The PLDPA 2013 was designed in order to give effect to the very limited right to access abortion under Article 40.3.3 as interpreted in *Attorney General v X*⁵⁷ and would be wholly unsuited to a new constitutional landscape. Thus, for example, it was the state's responsibility towards foetal life under Article 40.3.3 that purportedly justified the creation of such onerous pathways towards accessing abortion in the 2013 Act, as well as the continued criminalisation of abortion outside of these circumstances (albeit with a lesser maximum sentence than under the Offences against the Person Act 1861⁵⁸). Thus, we embarked on drafting a legislative model to replace that Act in the event of constitutional change.

⁵⁵ See P Hamilton in *Attorney General (SPUC) v Open Door Counselling Limited and the Wellwoman Centre Ltd* [1988] 1 IR 593, 597 ('The right to life of the unborn has always been recognised by Irish law').

⁵⁶ See M Enright, 'Childbirth, Choice and the Courts: The 8th Amendment and More' (*Human Rights in Ireland*, 21 April 2015) <<http://humanrights.ie/uncategorized/wanted-pregnancy-choice-and-the-courts-the-8th-amendment-and-more/>> accessed 16 June 2015.

⁵⁷ [1992] 1 IR 1.

⁵⁸ Protection of Life During Pregnancy Act 2013, s 22.

In doing so, we were guided by four principles.

First, and perhaps most importantly, we were determined to design a law that would regulate abortion in Ireland by primary reference to the bodily integrity, welfare, agency, autonomy and self-determination of pregnant women while still recognising a public interest in preserving foetal life where possible and with the pregnant woman's consent. By achieving this, we hoped to express a legislative commitment to no longer viewing a pregnant woman's body as the mechanism by which the State fulfils its perceived responsibilities towards the foetus, but rather as the body of a woman who maintains her agency and her constitutional rights notwithstanding her pregnancy. In that sense, we proposed a piece of law, which would aim to be transformative, to a significant degree, of the prevailing discourse around Irish abortion law.

Thus, the legislation does differentiate in terms of time limit, for example, between abortions in different kinds of circumstances. We propose five different circumstances in which abortion might be available: where there is a risk to health (up to the end of the twelfth week of pregnancy; Head 5), where there is a risk of severe or disabling damage to health (until the twenty-fourth week of pregnancy; Head 6), where there is a risk to life, including suicide (no term limit; Head 7), where there is a fatal foetal anomaly (no term limit; Head 8), and in cases of emergency (Head 9). In addition, we inserted key Guiding Principles in Head 3 that should be applied whenever the legislation is being interpreted or applied. These radically shift the approach to abortion from that the *status quo*. Head 3 provides:

- (1) Access to abortion is guaranteed in accordance with the provisions of this Act.
 - (2) In making any decision under the Act, or in providing medical care and services under this Act, the Heads shall be interpreted in the manner most favourable to achieving positive health outcomes for the pregnant woman, and to the protection of her rights, including the rights to:
 - a. life;
 - b. freedom from torture, cruel, inhuman and degrading treatment;
 - c. bodily integrity and autonomy;
 - d. self-determination, including the right to informed decision-making in relation to medical treatment;
 - e. private and family life, including the right to privacy;
 - f. health, including the right of access to appropriate health-care in a safe, prompt and timely fashion, and the right of access to healthcare information.
 - (3) Access to abortion services will not be impeded because of race, sex, religion, national, ethnic or social origin, disability, HIV status, marital or family status, immigration status, sexual orientation, age, birth or other social status.
 - (4) Sustaining embryonic and foetal life in pregnancy is an important social role, which should be voluntary and consensual.
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In addition, we reinforce the importance of consent to all medical treatment in Head 10, and decriminalise abortion in Head 4.

Second, the proposed law designates grounds for abortion which, to a significant degree, challenge the mainstream consensus on what a new Irish abortion law should contain. Politicians advocating for reform have tended to accept that a new law should permit abortion not only on grounds of risk to the life of the woman, but on the grounds that the pregnancy has come about through incest or rape, or that the foetus is incapable of surviving outside the womb.⁵⁹ There is also some agreement that abortion should be available on a limited ‘health’ ground – certainly one which would reassure doctors that they could act to end the pregnancy of a seriously ill woman whose life is not at risk. Our proposed grounds go somewhat beyond such mainstream consensus. In particular (i) we do not provide for a separate rape ground, in order to avoid any suggestion that a woman should be required to prove that she has been raped or to participate in any criminal process; (ii) we provide for a simple health ground, applicable in early pregnancy and falling short of the requirement to prove severe or disabling damage to health in Head 5 and (iii) we do not confine the foetal anomaly ground to situations in which the foetus is certain to die within the womb if the pregnancy continues. Bearing in mind the restrictions entailed in drafting abortion legislation for a political party in Ireland at the time, we strayed beyond mainstream political consensus to the extent that we felt European and international human rights law clearly enabled us to do.⁶⁰ As such, we suggest that our draft law may represent a

⁵⁹ See F Kelly, ‘Existing Abortion Laws are ‘Too Restrictive’ says Leo Varadkar’ *The Irish Times* (17 December 2014) available at <<http://www.irishtimes.com/news/politics/existing-abortion-laws-are-too-restrictive-says-leo-varadkar-1.2040072>> accessed 28 May 2015; C Zampas and J Gher, ‘Abortion as a Human Right—International and Regional Standards’ (2008) 8(2) *Human Rights Law Review* 249; R Cook, J Erdman and B Dickens, ‘Achieving Transparency in Implementing Abortion Laws’ (2007) 99(2) *International Journal of Gynecology and Obstetrics* 157; M Boyle, *Re-thinking Abortion: Psychology, Gender and the Law* (Routledge 1997); R Cook and B Dickens, ‘From Reproductive Choice to Reproductive Justice’ (2009) 106(2) *International Journal of Gynecology and Obstetrics* 106; H David, ‘Abortion Policies’ in J Hodgson (ed), *Abortion and Sterilisation: Medical and Social Aspects* (London 1981) 1.

⁶⁰ Council of Europe, *Parliamentary Assembly Resolution on Access to Safe and Legal Abortion in Europe* (16 April 2008) <<http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta08/eres1607.htm>> accessed 16 June 2015; The International Covenant on Economic, Social and Cultural Rights Art 12: ‘the right of everyone to the enjoyment of the highest attainable standard of physical and mental health’; International Convention on the Elimination of All Forms of Racial Discrimination of 1965 Art 5 (e)(iv); Convention on the Elimination of All Forms of Discrimination against Women of 1979 Art 11.1 (f), Art 12; Committee on Economic, Social and Cultural Rights, *General Comment 14: The right to the highest attainable standard of health* (22nd session UN Doc E/C12/2000/4 2000); Only Monaco, Poland, Andorra, Malta, Liechtenstein, San Marino, and Cyprus do not permit abortion on request <<http://www.polver.uni-konstanz.de/en/knill/research-projects/comparative-analysis-of-moral-policy-change/>> accessed 16 June 2015; See UN Assembly, *Report of the Special Rapporteur on Human Rights Defenders Mission to Ireland* (23 November 2012) <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-47-Add-3_en.pdf> accessed 16 June 2015; See *KL v Peru* [2005] Comm No 1153/2003, UN Doc CCPR/C/85/D/1153/2003 holding that placing the girl’s life in danger was a breach of the right to life; *P & S v Poland* App no 57375/08 ECHR [2008]; *RR v Poland* [2011] ECHR 828; *A, B and C v Ireland* (2011) EHRR 13; *O’Keeffe v Ireland* [2014] ECHR 96; *LMR v Argentina* [2011] (UN Doc CCPR/C/101/D/1608/2007), HRC Comm No 1608/2007; *International Planned Parenthood Federation European Network v Italy* App no 87/2012 [2014]; UNHRC, Ireland: Concluding

useful yardstick against which to measure later legislative proposals by a future Irish government.

Third, the proposed law aims to enshrine an approach to medical practice that replaces pro-natalist paternalism with a welfare orientation, seeing the pregnant woman as the patient and abortion as a medical procedure. This is intended not only to nudge a reorientation of Irish maternal medical practice, but also to empower medics to follow the course of medical treatment that they believe is best for their primary patient (i.e. the pregnant woman) as determined by doctor and patient together. The Guiding Principles in Head 3, which are set out in full above, are clearly oriented towards helping to achieve this, as is the Code of Practice proposed under Head 16 and which we argue ought to be periodically reviewed and renewed if appropriate in order to reflect international best practice.

Fourth, we were concerned that the legislation should ensure—to the extent possible—that abortion is actually available in practice, while also respecting the deeply held convictions of members of the medical profession and of the public in respect of the status of the ‘unborn’.⁶¹ This was of fundamental importance. It is quite clear that the legal availability of abortion can be frustrated by harassment, unregulated conscientious objection, and failure to provide services.⁶² In order to try to achieve this we focused on three areas: conscientious objection, provision of services and protection of locations in which services are provided, and review of negative decisions as to the availability of abortion in any particular case. In this respect, refusal of care on grounds of conscience is dealt with in Head 11.

This permits medical practitioners to refuse to participate in abortion on the basis of a good faith objection unless the abortion is ‘immediately necessary to save the pregnant woman’s life or to prevent severe or disabling damage to her health’, and places a duty on objecting medics to inform the pregnant woman and promptly make alternative arrangements. Importantly given the extent to which hospitals are run and influenced by the Catholic Church in Ireland, Head 11 makes it clear that ‘health care institutions may not invoke a right to conscientious objection under this Head’. Conscious of the possibility that widespread objection may result in women in some

Observations (2014) UN Doc CCPR/C/IRL/CO/4; UNHRC, Honduras: Concluding Observations (2006) UN Doc CCPR/C/HND/CO/1; UNHRC, Ireland: Concluding Observations (2008) UN Doc CCPR/C/IRL/CO/3; UNHRC, Paraguay: Concluding Observations (2006) UN Doc CCPR/C/PRY/CO/2; UNHRC, Sri Lanka: Concluding Observations (2004) UN Doc CCPR/CO/79/LKA ; UNHRC, Chile: Concluding Observations (2006) UN Doc CEDAW/C/CHI/CO/4; UNHRC, Ireland: Concluding Observations (1999) UN Doc A/54/38; UNHRC, Mauritius: Concluding Observations (2006) UN Doc CEDAW/C/MAR/CO/5.

⁶¹ It is important to note that pro-choice doctors also act out of conscience and, indeed, find themselves unable to act in accordance with their conscience under the prevailing law. See Doctors for Choice Ireland, *Submission to the United Nations Human Rights Committee for Ireland’s Review Under the International Convention on Civil and Political Rights* (12 June 2014) available at <http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/IRL/INT_CCPR_CSS_IRL_17440_E.pdf> accessed 16 June 2015

⁶² See R Fletcher ‘Conscientious Objection, Harm Reduction and Abortion Care’ in M Donnelly and C Murray (eds), *Ethical, Legal and Policy Debates in Irish Healthcare: Confronting Complexities* (Manchester University Press 2015) (forthcoming) available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2568449> accessed 16 June 2015.

parts of the country effectively being unable to access abortion without travelling significant distances, Head 11 also places a duty on the Minister for Health to ‘ensur[e] that a safe and timely service is maintained for patients when accommodating conscientious objectors. In particular, it shall ensure that all authorised locations...have at their disposal the means enabling them to perform abortions under this Act’.

The proposed law also establishes a Review Tribunal to review refusals to grant requests for abortion made by pregnant women (Head 12). This body would be independent and have a mixed membership of practising lawyers, medical practitioners, and ‘other persons’, all of whom would be required to disclose conscientious objections to abortion. The Tribunal would be obliged to convene quickly in order to hear a challenge to an adverse decision. Anxious to ensure that this body would be accessible, we propose strict timelines (Head 14), ensure that the pregnant woman can make representations herself or through a lawyer (Head 14), and provide that she should have an assistant decision-maker, interpreter and translator as required (Head 14).

Further measures to ensure that pregnant women could avail of abortion under the Act where desired and where the requirements for access are fulfilled include a provision to prohibit harassing and intimidating behaviour outside of locations where abortions are authorised (Head 15) and an obligation to ensure that women are provided with information on their entitlements under the Act (Head 18).

Finally, we consulted a wide range of comparative materials, NGOs and medics in order to ensure that the draft legislation we propose will simultaneously be appropriate for the particularities of Irish political, medical and popular positioning on abortion, reflect international best practice,⁶³ and be practicable from the perspectives of both women who wish to access abortion and medical professions in Ireland. We drew particular inspiration from the abortion laws in Spain,⁶⁴ Tasmania,⁶⁵ and Victoria.⁶⁶ Nevertheless, there were several essential questions of policy and practice to which we could not find answers in the time allotted. We include these as an appendix to the explanatory notes on the draft legislation.

Conclusions

In spite of the fact that there is general acceptance of the unsustainable nature of the *status quo*, the current Irish Government has decided that any decisions as to repeal of the 8th Amendment and reform of Irish abortion law are matters for the next government. That government will be elected in a 2016 General Election, and there are signs that at least some parties—notably Labour⁶⁷ and Sinn Féin⁶⁸—as well as a

⁶³ See RJ Cook, B Erdman and JN Dickens (eds), *Abortion Law in Transnational Perspective* (University of Pennsylvania Press 2014).

⁶⁴ Organic Law 2/2010.

⁶⁵ Reproductive Health (Access to Terminations) Act 2013.

⁶⁶ Abortion Reform Act 2008.

⁶⁷ See n. 12 above.

number of individual TDs⁶⁹ [members of parliament] are determined that abortion should be an election issue.

However, the nature of reform is not pre-determined and there is a real risk that such timidity would be shown that the reform would be minor, leaving the vast majority of real women and everyday decisions out of the realm of Irish abortion law. Such women would be relegated to the status of reproductive exile, if they have the means, or to that of involuntarily pregnant woman,⁷⁰ or criminal, if they do not.

Ensuring that reform is meaningful, comprehensive, practicable, and responsive to the needs, experiences and demands of women in Ireland requires the political, medical and legal establishments to unshackle themselves from the cognitive restraints that flow from the 8th Amendment and instead imagine a system for the provision and regulation of abortion care in Ireland that starts from a position of agency, welfare, self-determination and respect while still taking the public interest in the maintenance of foetal life with the consent of the pregnant woman into account. Through the design and publication of this draft legislation, we hope to establish the possibility of designing and introducing an appropriate and sustainable legislative regime.

⁶⁸ At their 2015 Árd Fheis [party conference], Sinn Féin voted to both allow abortion in cases of fatal fetal abnormality and to repeal the 8th Amendment: Marie O'Halloran, "Sinn Féin Delegates Support Abortion for Fatal Fetal Abnormalities" *The Irish Times* (7 March 2015) available at <<http://www.irishtimes.com/news/politics/sinn-féin-delegates-support-abortion-for-fatal-foetal-abnormalities-1.2130835>> accessed 23 March 2015.

⁶⁹ See for example private members bills introduced by Clare Daly TD (Protection of Life During Pregnancy (Amendment) (Fatal Foetal Abnormalities) Bill 2013, s. 1(2)) and Michael McNamara TD (Protection of Life during Pregnancy (Amendment) (Fatal Foetal Abnormalities) Bill 2015, s. 2(1)). Neither was successful.

⁷⁰ See further, M Little, 'Abortion, Intimacy and the Duty to Gestate' (1999) 2(3) *Ethical Theory and Moral Practice* 295.
